No. 15,102

In the

United States Court of Appeals

For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY, a corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

Appellant's Reply Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I. COMMENT ON APPELLEE'S STATEMENT OF THE CASE

Appellee has left out of her "Statement of the Case" several highly important facts. These are a few of the appellee's more glaring omissions:

1. A rifle is fired by squeezing or pushing the trigger.

2. The appellee admitted to the police that her husband had periods of depression and had been depressed lately (R. 49, 114).

3. The deceased was careful with guns (R. 411, 488).

4. The deceased had been borrowing increasingly upon his life insurance policies (R. 399-401).

5. At the time of the fatal shot, the rifle must have been standing upright, practically vertical to the floor (R. 517).

6. The deceased was bent slightly more than parallel to the floor at the time of the shot (R. 517, 518).

7. The muzzle of the rifle was pointed at his heart area, and was *within one inch* of his chest (R. 517).

8. Deceased kept his guns loaded with cartridges in the magazine, not in the chamber (R. 485).

9. The testimony respecting (a) the condition of the gun lever action, and (b) the possibility of firing by striking on the floor or hitting the hammer spur, related to a day more than a month after the death, and after the gun had passed through several hands.

II. COMMENT ON APPELLEE'S "QUESTIONS PRESENTED"

Appellee attempts in her "Questions Presented" to confine the issues on this appeal to the question of burden of proof. But this is a *reductio ad absurdam.* A vital point raised by this appeal is that the trial court forced appellant to shoulder an impossible burden of proof and at the same time erroneously admitted appellee's evidence and excluded appellant's evidence. A more apt list of questions presented is:

1. Did the trial court demand of appellant's case more than the law required to prove suicide?

2. Are the physical facts consistent with suicide and inconsistent with any *reasonable* hypothesis of accident?

3. Did the trial court commit prejudicial error in excluding appellant's evidence?

4. Did the trial court commit prejudicial error in admitting over objection appellee's evidence?

5. Was appellee entitled to interest as damages upon the full amount of commuted value as of May 4, 1954, or upon the installments of family income due then and until the date of judgment, or at all?

III. COMMENT ON APPELLEE'S ARGUMENT

A. Appellee Misunderstands Appellant's Contention That the Trial Court Misapplied the Law of Burden of Proof. Appellant Was Referring to the Burden of Producing Evidence, Not to the Burden of Persuasion. The Trial Court's Memorandum Opinion Demonstrates That the Trial Court Erroneously Required Appellant to Produce Evidence of a Precise Motive for Suicide and to Disprove with Evidence any Theory of Accident. The Law Makes No Such Impossible Demand of Appellant.

There is no argument over the question whether appellant had the burden of proof on its two affirmative defenses. There is argument, however, over the scope and extent of that proof. "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of the evidence." *Estate of Hampton,* 55 C.A. 2d 543, 564. Appellant does not deny that its burden was to produce evidence preponderantly showing suicide. See appellant's brief pages 32, 33. Appellant of course contends that it satisfied this burden. But the trial court concurrently demanded that appellant not only persuade but actually produce evidence showing the precise reason why deceased committed suicide and produce evidence refuting any theory of accident urged by appellee whether supported by evidence or not.

Appellee suggests that the trial court imposed no such burden upon appellant. But, the court did say, "If the court was of the view that the evidence presented spelled out but one conclusion, namely, suicide, it would not hesitate enter-

ing judgment for defendant herein" (R. 46). And the court did say, "The plaintiff on the other hand has suggested several ways in which the shooting may have taken place, all as a result of accident" (R. 46). And the court did say, "The court cannot, in view of the physical evidence in this case, and the lack of proof of suicidal motive on the part of insured, come to the conclusion that defendant insurance company has shown by a preponderance of the evidence that insured committed suicide" (R. 52). The implication is clear: The trial court would have required defendant to prove *with evidence the* motive for suicide and to disprove *with evidence* the "several ways," i.e., mere possibilities, of accident suggested by appellee.

Appellee suggests that appellant's statement of its burden of proof lacks common sense and is contrary to authority (B. p. 19-20). But, this is self refuting. The most recent California authority, *Long v. Cal.-Western States Life Ins. Co.,* 43 Cal. 2d 871, 882, clearly shows that mere preponderance of the evidence of suicide is all that the California courts require; that it is the function of the trier of fact to pick between a theory of suicide and theories of accident *which are supported by evidence,* and not to reject the former because of the existence of the latter which may not be supported by evidence. Note that in the *Long* case the California court states that preponderance of the evidence is all that is required (p. 882); that the court cites *Burkett v. N. Y. Life Ins. Co.,* 56 F.2d 105, 107-108 (p. 883), where the court rejected a theory of accident, saying, "That the firing was so caused is a mere possibility supported by nothing shown by the evidence"; and that in the *Long* case the theory of accident was supported by some competent evidence. "It was plaintiff's theory that the deceased had arisen from bed in response to the barking of the dogs, that

as he went on the porch to investigate, he stumbled over a chair or tripped on an outstretched string, and in falling the gun which he was carrying was accidentally discharged, with the bullet entering his forehead. Several witnesses testified that after the shooting they found a chair overturned in the vicinity of where the deceased fell and a string tied between the leg of a chair and a porch post near the front door of the house; and there was testimony that one of the little boys had put the string there during play that day" (p. 875). With this and other evidence in the record, the court then said: "The issue was thus sharply defined for the jury's evaluation of the *physical evidence* in determining whether the bullet entered the forehead consistent with plaintiff's theory of accidental death or entered at the temple consistent with defendant's theory of suicide" (p. 877). No California court has held that the insurance company must disprove hypotheses of accident not supported by reason and evidence. No California court has held that *the* suicidal motive is a *sine qua non*.

This is not to say, however, that appellant concedes a failure to prove motive or to disprove theories of accident. On the contrary, there is sufficient evidence of motive, and appellee's theories of accident fall of their own unreasonableness and lack of evidentiary support.

B. A Most Important Physical Fact in the Case Is That a Rifle Is Fired by Squeezing or Pushing the Trigger. That Fact, Coupled with the Other Physical Facts, Makes an Inference of Suicide Conclusive, Even Assuming There Were Competent Evidence That the Rifle Could Fire Due to a "Jar."

Appellee contends that a variety of "facts and circumstances" create an insufficiency of evidence to prove suicide (B. p. 21), and cause inconsistency with a theory of suicide and consistency with a theory of accident (B. p. 31). These

"facts and circumstances" are what the court in *Walker v. Phila. Life Ins. Co.,* 127 F. Supp. 26, 30, termed the "bizarre facts," such things as the jovial disposition of the deceased, his good humor the night before, his future plans, etc. But here, as in the *Walker* case, where the evidence shows that death was not accidental, the fact that there may be some evidence which, standing alone, seems inconsistent with a suicidal *intention* will not detract from the *conclusive proof of physical facts.*

Appellee claims that the physical facts present no theory whatsoever (B. p. 22). Appellant, on the other hand, contends that the physical facts are conclusive. Of these, the most important is that a rifle is fired by squeezing or pushing the trigger. This fact is so obvious that it tends to be overlooked. Certainly the trial court overlooked it. For, when a man shoots himself by rifle shot, the man being customarily careful with guns, and this occurs while he is bent horizontally over an upright rifle, the muzzle pointed at the heart and within one inch of the chest, the fingers accessible to the trigger, it is completely unreasonable to assume that the trigger was squeezed or pushed accidentally or intentionally in jest. The inference of suicide is the only *reasonable* inference. "The possibility of death by accident is excluded by the nature and location of the wound." *New York Life Ins. Co. v. Alman,* 22 Fed. 2d 98.

Appellee complains that the deceased's fatal position was cramped and awkward. This, too, is an important fact. It shows again the intentional nature of the act. Having already stooped slightly, at the place of the shooting, the deceased naturally for the second or so would have bent further over the gun, rather than stand upright and hold the gun in front of him in the crowded passageway, as suggested by appellee (B. p. 34). Furthermore, one would not,

under such circumstances, and for no reason have assumed a still more cramped and awkward position except *voluntarily*. By so positioning himself, we infer the deceased only could have contemplated suicide. The series of backtracking inferences (B. p. 22), that he knew the rifle was loaded and cocked (recall he kept his guns loaded with shells in the magazine, not the chamber), when he squeezed or pushed the trigger are again the only reasonable inferences. What he did thereafter was pure reflex.

Consider the only other alternative posed by appellee. From her evidence that the rifle could be fired by striking it upon the floor appellee argues that the death could have occurred by the deceased's falling over a gun thrust upon the floor in order to support himself (B. p. 36). There is a most obvious error in this theory. To assume that a person would support himself with a lethal weapon by pointing it at his heart and within one inch of his chest, without suicidal intentions, is completely unnatural (B. p. 36). Certainly it would not be done voluntarily. And certainly every instinct would cause the deceased to have pointed the gun elsewhere if it had been done involuntarily. Moreover, the theory does not gibe with any physical facts. The indentation made in the floor was similar to indentations made when the rifle was *resting* upon the floorboard and the trigger *intentionally* pulled (R. p. 511). The shot occurred in the middle of the passageway; there was nothing there which could have caused the deceased to stumble. There was no evidence of an accidental stumble. The deceased was careful with guns and was an experienced hunter. As such he never would have carried a gun by the muzzle but would have held the rifle pointed down with the butt resting under his armpit. Even had the deceased stumbled, the probable way to have supported himself would have been to grasp onto some of

the surrounding furniture, rather than tumble over a rifle that might have been loaded. In order to avoid harming any member of his family, he would naturally have fired the shot near a wall rather than in the middle of a room. Like considerations for his family would have caused him to aim at the heart rather than disfigure himself by blowing his brains out. The same considerations for his family would have caused him, an insurance man, to leave no traces of suicide, such as suicide notes, so as to preserve insurance monies. But most important of all, had the deceased stumbled, his natural reaction would have been to bend his knees, throw back his head, and throw out his arms, making the infliction of the fatal wound completely improbable. "Where a person trips, the normal movement is to throw out the hands to break the impending fall." *Long v. Cal.-Western States Life Ins. Co.,* 43 Cal. 2d 871.

In short, appellee's hypothesis is, in the light of the physical facts, completely improbable; it is unreasonable, and does not suffice to support the presumption against suicide as against the conclusive inference of suicide. See all the cases cited by appellant in its opening brief, page 47.

Appellee's hypothesis also is unlike those presented in her cited cases. It is supported by no evidence and is contrary to the evidence. Thus, unlike *Prudential Ins. Co. of America v. Baciocco,* 29 Fed. 2d 966, where all that was known of the death was that the deceased was found drowned beneath a cliff, here the manner of death is known. Unlike *Wilkinson v. Standard Acc. Ins. Co.,* 180 Cal. 252, there was no physical evidence whatsoever to show that the fatal weapon was fired by an accidental striking. Unlike *Beers v. Calif. State Life Ins. Co.,* 87 C. A. 440, there is no possibility here that the insured had bent over the rifle, pointed it at his heart, and pushed or squeezed the trigger

due to *mistake*. Unlike *Brooks v. Metropolitan Life Ins.*, 27 Cal. 2d 305, there was no conflict in the evidence over the location or position of the agency causing death, one line of testimony supporting a theory of accident, the other a theory of suicide. Unlike *Jenkin v. Pacific Mut. Life Ins. Co.*, 131 Cal. 121, where the sole facts upon which the court was to decide accident, murder or suicide was the bullet wound which caused death two days after it was inflicted, here the position of the body is known, the direction of the bullet is known, not only with reference to entrance and exit, but also with reference to the floor, and the position of the fatal weapon is known.

The court in the *Jenkin* case spells out a distinction in the presumption against suicide. It operates only "when nothing more is shown than that [death] was brought about by a violent injury, and the character of such injury is consistent with the theory of accident." Appellant's proof here of course showed more than violent injury, and the character of the injury is not consistent with a theory of accident.

C. Bearing in Mind That a Rifle Is Fired by Squeezing or Pushing the Trigger, a Most Important Physical Fact in the Case, and That Appellee's Theory of Accident Is Based on the Supposition That the Rifle Could Have Fired by Striking It Upon the Floor, the Prejudicial Character of the Trial Court's Error in Allowing Testimony Concerning the Ballistics Tests Is Conclusively Established. Nor Was the Error Waived as Claimed by Appellee.

Appellee argues that the error in admitting evidence concerning the ballistics tests was not prejudicial! (R. p. 42) Appellee refers to the trial court's self-serving statement that it would have reached the same conclusion regardless of such testimony. But, as pointed out in appellant's opening brief, the trial court relied upon that testimony. And its prejudicial character is conclusively shown by the

fact that the only theory presented in appellee's brief is based upon that testimony, and by her own admission on page 35: "The fact that the gun could be accidentally fired distinguishes this case from the many cited by appellant."

Nor was the error waived. Appellee asserts a "confession and avoidance" argument of waiver, thus conceding the erroneous and damaging nature of her expert testimony. Appellee claims such a waiver from the fact that appellee's witnesses were cross-examined (B. p. 42). Her cited cases of course do not so hold. The correct rule is set forth in *Moore v. Norwood,* 41 C.A. 2d 359, 369:

> "Neither does the fact that appellant cross-examined respondents' expert witnesses deprive the former of the benefit of his objections made at the trial, nor does such action militate against him on appeal. The rule in this regard is thus succinctly stated in *James v. Tully,* 178 Cal. 380, 384 [173 Pac. 577]:
>
> " 'By the presentation on his own part of such independent proofs the objecting party, of course, waives his objection and point on appeal; not so, however, when the objecting party undertakes to exercise his right to cross-examine a witness as to statements to which he has erroneously been permitted to testify. Were it otherwise, one of the main functions of cross-examination would be most seriously impaired; for a party after rightfully objecting to the admission of evidence, may by his cross-examination lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action.' "

Nor was there waiver by failure to make the proper objection. Appellee erroneously states that appellant's objection was limited to the objection that the testimony would be speculation and would not be the proper subject of expert

testimony (B. p. 40). Appellee claims that for the first time on appeal, appellant raises the objection that there was lack of foundation (B. p. 42). Appellee is wrong. One ground for its motion to strike was that the tests were "not conducted under circumstances similar to the death of deceased," and at the time of the initial objection, appellant's counsel objected on the ground that, "There is no showing here that these various tests involve the way the gun was discharged at the time of the shooting" (R. 507).

The tests were not similar. One essential dissimilarity was that it was not shown by appellee that on the day of the tests the gun's condition was similar to its condition more than a month previous. It had since passed through the hands of the deputy coroner, police and Dr. Kirk. Another is that the cartridges were not similar, since the bullet and powder had been removed, and there was no testimony that their removal would not make a difference in results. Another is that there was no testimony as to the height from which the rifle was dropped, nor as to the amount of force or speed with which the gun was struck, and that it was possible timewise or otherwise for the deceased to have ended up in his slightly more than horizontal position after having dropped the gun with sufficient force or distance or speed to have caused the gun to fire. And finally no testimony was given showing that the type of surface against which the butt was struck was similar to the floor in deceased's basement.

It does the appellee no good to use the semantic argument that her expert's testimony did not relate to experiments but merely to the description of the mechanical operation of the gun (B. p. 40). Her experts testified that they "tested" the rifle (R. 507), and the very case cited by appellee, *People v. Willis,* 70 C.A. 465, (which did not involve tests to prove

a mechanical defect) talks of "experiments which were made with the gun" (p. 472). And appellee herself refers to them as "tests" (B. p. 40).

The simple fact is that appellee's experts experimented with the gun, and appellee failed to show that the experiments were conducted under circumstances and conditions similar to the time, place or manner of death of the deceased. *McGough v. Hendrickson,* 58 C.A. 2d 60, holds it was her burden so to do. It was an abuse of discretion for the court to admit the testimony; and in any event her failure to lay such a foundation, particularly respecting the condition of the gun, emasculates its value as evidence. The failure of appellee to support her position with any case in point, and her reliance upon a purported waiver, is an implied concession that the evidence was inadmissible.

D. The Exclusion of Appellant's Evidence on Suicidal State of Mind Was Prejudicial Error.

Appellee argues that the adjuster's report, erroneously excluded from evidence, was too remote in time, and was not made in the scope of the adjuster's authority as agent of the deceased because the agent represented the liability insurance carrier (B. p. 25). The short answer to the latter argument is that the adjuster was acting in a dual agency capacity, as agent both of the deceased and of the liability carrier. For example, the release secured by the adjuster was for the deceased and released rights as against the deceased. That an adjuster's declarations in connection with the adjustment of a claim are admissible hearsay as against his principals is too clear for argument. See *State Farm Mut. Auto. Ins. Co. v. Porter,* 186 Fed. 2d 834 (9th Cir. 1950), where the adjuster's statements and admissions of the attorney representing both the tortfeasor and insurance

company were held to be admissible, originally in the negligence action, and then later in an action on the policy.

On the question of remoteness, it first should be noted that appellant's objections to letters of the deceased antedating the adjuster's report were overruled by the court below (R. p. 481). Second, appellee's conclusion that the matter was "laid to rest" is merely her inference from evidence presented by her to the effect that persons other than deceased had had no communication with the prostitute referred to in the report. The question of admissibility of appellant's evidence is not determined by its conflict with appellee's evidence. Third, both the feelings of remorse which the deceased presumably suffered and the intention of the prostitute to make good on her "fine position" undoubtedly did not disappear in the space of a few months. "A state of mind once proved to exist is presumed to remain such until the contrary appears." *Smith v. Capital Gas Co.,* 132 Cal. 209, 212. Finally, it should be noted that the Lakeview incident was but one, although an integral part, of a pyramiding effect of appellant's evidence showing a suicidal state of mind and should be added to appellant's other evidence of periods of depression, cyclothymic personality, running and increasing debts, etc.

Appellee also seeks to avoid the prejudicial error which occurred in the exclusion of Dr. Bennett's expert testimony (B. p. 26). Again appellee would choose to determine the admissibility of appellant's evidence by her inferences and deductions from other evidence. Appellee's claim that the question assumed facts not in evidence or failed fairly to represent the evidence presupposes that appellant's hypothetical question was required to be based on appellee's evidence alone. But "It is not essential to the propriety of a hypothetical question that the facts assumed should be

undisputed. The question is proper if it recites only facts within the possible or probable range of the evidence and if it is not unfair or misleading." *Guardianship of Jacobson,* 30 Cal. 2d 312, 324. Appellant's evidence, especially the testimony of appellee and witness Wilkerson, established each of the facts stated in the hypothetical question, and the question was therefore proper.

Again, appellee claims that the exclusion of Dr. Bennett's testimony was not prejudicial. But the best refutation is her brief. It is replete with the very conclusions which our proffered testimony was designed to rebut. For example, on page 38 she asserts that her evidence showed "that insured was not the kind of person to destroy himself." On page 39 she talks of "the evidence of insured's character and circumstances which unerringly show a positive intention to continue to live." It was for this reason that the appellate court in *Smith v. Metropolitan Life Ins. Co.,* 47 N.E. 2d 330, 333, held that the alienist's testimony should have been admitted, to rebut the effect of "evidence that he was in good health, happily married, cheerful on the morning of his death," etc. Appellant should have been given the opportunity to show that appellee's uninformed conclusions, *supra,* were, to an informed expert, incorrect. Appellant had a right to submit its theory of the case by a hypothetical question without adopting any part of its opponent's theory. *Coogan Finance Corp. v. Beatcher,* 120 C.A. 278.

And, finally, appellee's complaint that Dr. Bennett had not examined the deceased is merely a complaint against all expert testimony. The case "is governed by the established rule in California that a duly qualified expert witness may express through an answer to a hypothetical question an opinion upon a subject of expert testimony." *Ver Bryck v. Luby,* 67 C.A. 2d 842, 845.

E. The Exclusion of Appellant's Rebuttal Opinion Evidence Was Prejudicial Error.

Appellee asserts that her experts expressed no opinion as to the cause of death (B. p. 40). But the record (R. 515, 529) will disclose they did so in response to appellee's questions. The above assertion and her attempt to characterize their testimony merely as description of the mechanical operation of the gun clearly shows recognition that error was committed below. Notwithstanding her statement to the contrary (B. p. 41), *People v. Heacock,* 10 C.A. 455, is directly in point in holding that the admission of such testimony as to possibilities of accident is prejudicial error. So also would be the admission of the Coroner's jury verdict. Its only conceivable relevancy would be as the hearsay opinion of the jury that there was a possibility of accidental death. Therefore, the trial court, having allowed appellee to introduce inadmissible opinion evidence, should not have compounded the error by excluding the more authoritative opinions of the police and coroner. They were the ones who talked to appellee and were thus better qualified to judge the meaning of her admission that the deceased had periods of depression and was depressed lately. They were the ones who were on the scene minutes after the shooting and were able to observe the undisturbed physical evidence and condition of the premises. They were the ones with authoritative experience who had made innumerable determinations of suicidal death.

F. Appellee Fails to Answer Appellant's Argument on Its Misrepresentation Defense.

Appellee relies upon *McEwen v. New York Life Ins. Co.,* 42 C.A. 133 (B. p. 44) for its holding there that the question whether the insured had used alcohol to excess was a question of fact, and claims that the evidence thereon is in conflict

(B. p. 45). But, in the *McEwen* case, as the court there notes, "There is little testimony touching the quantity of his libations." The importance of the *McEwen* case is that it states the appellant's burden of proof below: To prove habitual use, and that on only more than one occasion the insured drank to excess. Appellant claims that this burden was fully satisfied. Being under the influence of alcohol most of the time, as witness Wilkerson testified the deceased was, appellant submits, is drinking to excess. That some friends and his family did not observe this activity is not a conflict of evidence. That these same friends and family testified that the insured drank is proof of habitual use.

In any event, appellee utterly fails to dispute the holdings of *Allstate Ins. Co. v. Miller,* 96 C.A. 2d 778; *Maggini v. West Coast Life Ins. Co.,* 136 C.A. 472, and *Cal.-West. States Etc. Co. v. Feinsten,* 15 Cal. 2d 413, cited by appellant in its opening brief, which clearly demonstrate the error below of excluding appellant's evidence on materiality of the representations. Appellee contents herself with arguing, without citation of authority, that the testimony was improper and that the error could not have been prejudicial because the trial court found that no misrepresentations had been made (B. p. 47). But the error should be considered with reference to the evidence and the numerous other erroneous rulings on admission and exclusion of evidence, and when so considered, the error must be deemed prejudicial. See *Stinson Co. v. Lemoore Co.,* 45 C.A. 241, 256.

G. Appellant Did Not Waive Its Right to Object to the Award of Interest. Both in Its Answer, and in Its Requests for Findings, Appellant Denied That Appellee Was Entitled to Interest on the Full Commuted Value as of May 4, 1954. Nor Did Appellant Stipulate Away Its Right so to Object.

Appellee argues that appellant stipulated away its right to object to an award of interest, because of the following

language: "We will take the stipulation that the proof of loss was duly filed and no objection was made to that proof of loss, other than those stated in the two separate defenses in the answer * * *" (R. 330; B p. 49) Obviously the stipulation makes no reference to an award of interest, and, in fact, the objection was raised at the first opportunity afforded appellant so to do, at the time of settlement of findings and judgment (R. 54). Appellant's answer denied that appellee had any rights to the commuted value (R. 33).

Appellee nowhere explains how her damages could have been certain on May 4, 1954, without first having given notice to appellant of her election to choose either the family income or commuted value. Thus under the clear terms of *Calif. Civ. Code* § 1449 and § 3287, no interest should have been awarded upon the commuted value as of the due date of payment. Furthermore, it is questionable whether interest should be allowed to date of judgment upon the accrued amounts of family income, due to the same uncertainty. In any event, § 1449 vests the right of selection in the appellant, and the latter amount of interest is the least erroneous.

CONCLUSION

Wherefore, appellant respectfully submits that the judgment should be reversed for all the foregoing reasons.

Respectfully submitted,

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